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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 701

APPENDIX AVIATION CORPORATION,
Appellant,

v.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLEE'S MOTION TO DISMISS AND SUPPORTING BRIEF

EDWIN K. STEERS,
Attorney General of Indiana,

LLOYD C. HUTCHINSON,
Deputy Attorney General,
Attorneys for Appellee,

219 State House,
Indianapolis, Indiana,
MElrose 5-4456.

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MAY IT PLEASE THE COURT:

Pursuant to Rule 16 (2) (b) of this Court, appellee in the above entitled case respectfully moves the Court to dismiss said appeal on the ground that it does not present a substantial federal question.

Opinion Below

The opinion, decision and judgment of the Indiana Supreme Court, as yet unreported officially, is unofficially

reported in 143 N. E. (2d) 91 of the West Reporter System and is fully and correctly reproduced in Appellant's Jurisdictional Statement as Appendix "A" thereto.

Jurisdiction

The federal statute which confers jurisdiction of this appeal, if this Court accepts jurisdiction, is properly stated by appellant as being found in 28 U. S. C. A. Sec. 1257 (2).

Further, the claimed invalidity of the tax imposed under the facts herein was based upon appellant's sole contention that it violates Article I, Section 8, Clause 3 of the Constitution of the United States. This single issue was raised by appellant at the inception of the case and at every stage of the proceedings.

The opinion and decision of the Indiana Supreme Court denied appellant's claim, holding that the tax was imposed upon receipts which "resulted from transactions completely performed in Indiana," the taxing state. 143 N. E. (2d) 91, 99.

However, the basis of Appellee's Motion to Dismiss is that said appeal does not present a substantial federal question because the questions sought to be presented have already been decided by prior, unaltered and substantially identical and indistinguishable decisions of this Court, so as to leave no room for real controversy.

Equitable Life Assurance Society v. Brown (1902), 187 U. S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190;

Zucht v. King (1922), 260 U. S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194;

Palmer Oil Corp. v. Amerada Corp. (1952), 343 U. S. 390, 72 S. Ct. 842, 96 L. Ed. 1022.

Constitutional Provisions and Statutes Involved

The only constitutional provision upon which appellant relies is Article I, Section 8, Clause 3 of the Constitution of the United States.

The statute involved is the Indiana Gross Income Tax Law of 1933, as amended. This statute as now amended may be found complete with all amendments to date in Burns' Indiana Statutes Annotated, 1933, Vol. 11, Part 2 (1951 Replacement), Sections 64-2601 to 64-2635 inclusive.

The levying clause of said Act as last amended by Indiana Acts of 1937, Chapter 117, Section 2, in so far as relevant to this appeal, is correctly stated on page 3 of Appellant's Jurisdictional Statement.

The exemption provided by Section 6 (a) of that Act, as quoted on page 3 of Appellant's Jurisdictional Statement, is nothing more than a recognition by the Indiana Legislature of the supremacy of the Commerce Clause of the United States Constitution, but only to the extent as so interpreted by this Court.

Questions Presented

A. Whether the appellant, manufacturing goods in Indiana as prime contractor for the United States Government, is engaged in interstate or local Indiana commerce when such goods are inspected and accepted by the United States Government at appellant's plant in Indiana, loaded at appellant's dock in Indiana by appellant upon a carrier designated by the United States Government and immediately shipped f.o.b. from said Indiana point, using a Government Bill of Lading, to points outside of Indiana designated in such bill of lading?

B. Whether the appellant, manufacturing goods in Indiana as subcontractor for corporations which are prime contractors with the United States Government, is engaged in interstate or local Indiana commerce when such goods are inspected and accepted by the United States Government at appellant's plant in Indiana, loaded at appellant's dock in Indiana by appellant upon a carrier designated by the United States Government and immediately shipped f.o.b. from said Indiana point, using a Government Bill of Lading, to such prime contractors outside of Indiana as designated in such bill of lading,—such goods being subject to acceptance by such prime contractors upon delivery at said destination outside of Indiana?

STATEMENT

Appellant, a Delaware corporation qualified and admitted to do business in Indiana, maintains an office and two manufacturing plants in St. Joseph County, Indiana. During the years in question, from January 1, 1952, to and including December 30, 1953, appellant entered into contracts with the federal government, executed at places outside of Indiana, for the manufacture of certain items needed for the armed forces. Appellant's performance of these contracts and the imposition of the tax upon the receipts therefrom form the basis for question "A" heretofore stated,—the material facts of which are hereafter set forth under division "A" of this statement.

A second class of contracts were entered into by the appellant as subcontractor with other prime contractors which had contracts with the United States Government. Appellant's performance of this second class of contracts and the imposition of the tax upon the receipts therefrom form the basis for question "B" heretofore stated,—the

material facts of which will be discussed hereafter in division "B" of this statement.

The facts in this case are embodied in an extensive stipulation of facts, which recites the fact pattern in considerable detail and includes many representative provisions of the contracts involved,—said stipulation likewise being divided so as to treat separately each of the two classes of contracts involved.

A.

Appellant's contracts in which it was the prime contractor with the United States Government had the following provisions and fact patterns which were common to all.

1. Throughout the period involved, the United States Government maintained inspection employees numbering approximately 26 at appellant's Indiana plants, which were under the supervision and control of a Government Chief Inspector and whose function was to accomplish the inspection provisions of the various contracts. The inspection process by the Government began at the receiving dock of appellant when raw materials or component parts furnished by others arrived. This Government inspection process, in varying degree of intensity from an occasional spot-check to a complete and detailed inspection of a relatively large number of partially or completely manufactured articles, once begun, continued through all steps of manufacture and preparation for shipment through the instant when the completely manufactured product, completely packed, was placed on board the common carrier by appellant. In this long continuing process the Government from time to time indicated its approval or disapproval of raw materials and component parts as

well as approval of completely manufactured items and also indicated its approval or disapproval of the materials used and steps taken in preserving, packaging, packing and marking, which were necessary before the contract obligations of appellant to produce, prepare for delivery and deliver an acceptable article could be fulfilled.

The language set forth below is typical of that used in contracts between appellant and the United States Air Force:

> "Plant of the Contractor at South Bend, Indiana, is hereby designated as the place for final inspection and acceptance by the Government of the supplies called for hereunder."

The language set forth below is typical of that used in contracts between appellant and the United States Navy:

> "Final inspection shall be made at Contractor's plant at South Bend, Indiana, by Field Inspection Service."

The language set forth below represents two (2) forms of expression to be found in contracts between the appellant and the United States Army:

> "(1) When delivery is to be f.o.b. common carrier at contractor's plant final inspection and acceptance of items will be at contractor's or subcontractor's plant and shipment will be made on Government bills of lading, by rail or truck as specified. Contractor will make delivery at the nearest rail facility if rail shipment is specified."
>
> "(2) Final inspection and acceptance will be made at contractor's plant."

2. Upon the Government's final inspection as above outlined and provided, the Government Inspector filed and

attached to each article approved by him a tag or label, Form 50C, called the "Acceptable" or "Serviceable Label," which is Exhibit E of the Stipulation.

3. After this label was attached to the article, it was packaged in conformance to the instructions and requirements of the contracts. The package was then addressed and marked showing the destination of the article. From time to time, the package and preservation of the article were inspected by breaking open a package ready for shipment. When articles were ready for shipment, the Government Inspection Officer prepared Form DD 250 (Stipulation Exhibit F), called the "Material Inspection and Receiving Report;" containing the following statement:

> "I certify that the items listed herein have been inspected by me, or under my supervision. They conform to contract and have been accepted except as noted on the reverse hereof,"

following which there is a place for the date and signature of the Inspecting Officer. Two copies of this form were attached to one of the packages of the shipment by the Inspecting Officer, after which appellant notified the common carrier designated by the Government that the shipment was ready for transportation. Upon the arrival of the common carrier's equipment at appellant's dock at South Bend, Indiana, appellant loaded the goods on the carrier and delivered the shipping papers, including the Government Bill of Lading, which had been previously prepared by Government personnel and furnished to appellant to cover the shipment.

4. The destinations of all shipments were beyond the territorial limits of Indiana. The bill of lading and shipping papers delivered to the carrier identified a destination

point outside the State of Indiana for each shipment determined by the Government by one of the following methods:

A. The destination or destinations were stated in the contract.

B. According to the contract the destinations were contained in written shipping instructions furnished to appellant in advance of preparation of the articles for shipment.

Note: In some contracts the destination or destinations of part of the articles was stated therein, and the destination or destinations of the remainder was furnished in accordance with the method B above.

A typical shipping instruction received by the appellant from the United States Government is Exhibit H to the Stipulation.

5. All items were shipped by common carrier and delivery was "to the Government, f.o.b. cars or carriers equipment at the plant" of appellant where a shipment was to be by rail or air. Where a shipment was by other means than rail or air, delivery was to the Government f.o.b. the plant of appellant.

6. In all shipments, the Government Bill of Lading was used wherein the property shipped was identified as property of the United States Government. (Stipulation Exhibit "D.")

The tax and interest imposed upon the receipts of appellant from the above described transactions in which it was a prime contractor with the United States Government and paid to the appellee were in the sum of $525,647.24.

B.

The second class of contracts involved were those in which the appellant as sub-contractor entered into contracts with other manufacturers of material for the armed forces who had prime contracts with the Federal Government. In respect to this latter class, the amount of tax and interest in controversy is $21,087.40. The procedure followed under these sub-contracts was generally the same as that followed in respect to those situations in which the appellant was the prime contractor with the Government. Government inspectors inspected and accepted the articles manufactured pursuant to said sub-contracts at appellant's Indiana plants in the same manner as indicated in division "A," *supra*, and there attached the various forms of inspection and acceptance heretofore stated. In one instance, that of Boeing Airplane Co., a representative of such company had the right to exercise surveillance and inspection at appellant's Indiana plant and did so. All of the items sold under all of the sub-contracts were delivered to the corporation with whom appellant contracted f.o.b. South Bend, Indiana, and were placed on board a common carrier's equipment by appellant in accordance with contract requirements. All shipments were made f.o.b. upon Government Bills of Lading, designating an out-of-state destination either stated in the sub-contract or by instructions from the corporation having the prime contract with the government. As in division "A," *supra*, the Government designated the common carrier and prepared all shipping documents.

There was one distinction and difference between appellant's sub-contracts with other corporations and its prime contracts with the Government, in that articles produced by the terms of the sub-contracts were subject to inspection and acceptance or approval by the buyer at destination, after

they had been inspected and accepted by the Government at appellant's plant.

In closing this Statement of facts, it may be noted that appellant has not questioned the facts as stated in the opinion of the Supreme Court of Indiana, either by its Petition for Rehearing filed with that Court or by its Jurisdictional Statement filed with this Court.

ARGUMENT

I.

The lower Court's decision is founded upon a substantially identical decision of this Court.

With respect to appellant's receipts derived as prime contractor with the United States Government, the facts herein and the decision of the Indiana Supreme Court are substantially identical in every material respect to Department of Treasury v. Wood Preserving Corporation (1941), 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188. Comparison of the two cases reveals the following factors common to each.

1. This case, as in the Wood Preserving case, is one concerning *taxation* and in each the claim of tax immunity was based upon Article I, Section 8, Clause 3 of the United States Constitution.

2. This case, as in the Wood Preserving case, involves the Indiana Gross Income Tax Law.

3. In this case, as in the Wood Preserving case, the contracts between the parties recognized that the purchaser would transport its goods to points outside the State of Indiana.

4. In this case, as in the Wood Preserving case, prior to delivery to the purchaser, the purchaser, by its agent, inspected the goods sold and accepted those which were approved.

5. In each of said cases, the sale was completed in Indiana and the buyer acquired delivery and control of the goods in Indiana.

6. In the Wood Preserving case, as in this case, the goods were loaded upon the carrier in Indiana at the seller's expense. (See Wood Preserving Corporation v. Department of Treasury (1940), 114 F. (2d) 922 at page 924.)

7. In each of said cases, the shipments were f.o.b. the seller's place of business or point of sale in Indiana so that the freight charges were not paid by the seller.

8. In each of said cases, there was a consignee designated in the bill of lading located at a point outside of Indiana.

9. In each of said cases, the seller had no responsibility to provide safe delivery to the out-of-state destination and no liability concerning what happened to the shipment after it was placed in the hands of the carrier.

10. In each of said cases, the buyer had the absolute power and right to divert the shipment to any place it might desire, including points in Indiana.

The only point of distinction and difference between the two cases is that in the Wood Preserving case the buyer (a railroad) was also the carrier of the goods purchased, whereas in appellant's case the carrier is the agent of the buyer, a distinction which is so insubstantial as to be of no legal significance, as hereinafter discussed.

We urge that the Wood Preserving case, *supra*, so resembles appellant's case that it may fairly be said to be not only controlling, but also identical in every material respect.

II.

In answer to appellant's contended distinguishment of the Wood Preserving case. Appellant is not claiming that the Wood Preserving case, *supra*, was incorrectly decided or that the same has been overruled by subsequent decisions of this Court. It expressly recognizes the current vitality of

said case and so stated in briefs filed with the Indiana Supreme Court as indicated in that Court's opinion, 143 N. E. (2d) 91, at page 97, wherein the appellant stated:

> "The Plaintiff in the instant case and the Defendant here are not in dispute over transactions of the kind which occurred in the Wood Preserving case. If, for example, items are manufactured and sold to the United States Government to be transported to a point outside the State by the Government's own conveyances and the Government then sends its own transportation equipment to South Bend to pick up the items, as for example, by military plane at our County airport, everyone would admit that the State of Indiana is entitled to collect gross income tax on the gross receipts from such sale. The example corresponds to the facts of the Wood Preserving case."

The first point of distinguishment claimed by appellant between the Wood Preserving case and its case is that in the former the buyer accepted delivery of the goods in Indiana on its own transportation equipment, whereas in appellant's case the government did not receive the goods on its own equipment but on the equipment of a common carrier. Appellant has pursued this distinction in its Jurisdictional Statement, page 20, claiming that principles of agency are "perfectly respectable" but that there is something improper in applying the rules of agency to a commerce case. It is to be noted, of course, that the rule of agency is not a mere fiction derived solely from the common law or judicial decision. Instead, the rule of agency ordinarily (as herein) is a recognition of rights and obligations arising out of contract. Appellant refers to no authority holding that the rule of agency, while applicable in commercial transactions, is not to be applied in commerce cases. Whatever a person may do himself, he may do by an agent and if, in this case, the Government chose to accept delivery by its agent, the

carrier, the sale of the goods by appellant to the Government was wholly consummated within Indiana. The Government, as in the case of corporations, can act only through agents. We attach no significance to the fact that in the Wood Preserving case the carrier's equipment belonged to the buyer. If appellant's claim is sound, then it might likewise be claimed that acceptance of the ties in Indiana in said case was ineffectual since they were accepted by a representative of the railroad and since such case involved the commerce clause.

Concerning whether the carrier was in fact the agent of the Government, reference is made to the following case. In the case of Illinois Central R. R. v. U. S. (1924), 265 U. S. 209, the Court was considering the question of whether or not the Government was entitled to reduced rates applicable to the shipment over land-grant railroads by virtue of the use of Government Bills of Lading. Justice McKenna, who delivered the opinion of the Court, posed the question in the case, at page 212, as follows:

> "The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery."

And at page 214, as follows:

> "* * * the title to the property passed to the United States by delivery at the initial point of shipment to the *carrier as agent*. Land-grant rates were applicable."
>
> "* * * The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The

incidental regulations between it and the contractors cannot divest that ownership in the interest of the Railroad Company." (Our emphasis)

For the foregoing reasons, we believe that a buyer may accept delivery within the state of sale not only upon the buyer's transportation equipment, but also by means of the equipment of a common or contract carrier when in fact such carrier is the agent of the buyer as herein.

Another claimed distinguishment of the appellant is that it was required by its own personnel, using its own equipment, and entirely at its own expense to deliver the items manufactured on board a common carrier accompanied by shipping papers showing an out of state destination. Although it does not appear in the decision of this Court in the Wood Preserving case, 313 U. S. 62, that the seller loaded the ties upon the carrier, reference to the lower Court's opinion in Wood Preserving Corporation v. Department of Treasury (1940), 114 F. 2d 922, at page 924 discloses that the ties were loaded upon the cars of the railroad at the expense of the seller. However, since the ties were finally accepted in Indiana, delivered to the buyer in such state and the seller had no further responsibility with respect to the contract of sale, this Court in 313 U. S. 62, apparently considered the act of loading the ties upon the carrier as being not sufficiently important to consider or mention.

Appellant also places reliance upon Joseph v. Carter & Weekes Stevedoring Company (1947), 330 U. S. 422, 67 S. Ct. 815, invalidating a tax of the City of New York imposed for the *privilege* of carrying on business within the city, as applied to the business of stevedoring. Said case is a sequel to Puget Sound Stevedoring Co. v. Tax Commission (1937), 302 U. S. 90, which is reaffirmed by the Carter-

Weekes case. The Puget Sound decision relates the history of the stevedoring business, pointing out that such companies do the work formerly considered a part of the duty of the ship's crew and held that loading and unloading by such companies is necessary for interstate and foreign commerce and, therefore, that loading and unloading are a part of interstate commerce. Said decisions point out that since the tax is for the *privilege* of carrying on business within the city, such tax cannot apply to a business which is interstate, since only the Congress has the power to grant licenses to engage in interstate business. The Carter-Weekes decision points out that if such taxes were allowed, then in port cities and transportation centers larger portions of revenue could be obtained from the flow of commerce and the avoidance of such a local toll through a locality was one of the reasons for the adoption of the Commerce Clause.

It is to be noted in the Carter-Weekes decision that the Wood Preserving case is specifically mentioned and explained (330 U. S. 422 at page 431) as being a tax on a local business "by reason of the fact that the taxpayer sold and delivered its ties intrastate before transportation began, 313 U. S. at 67."

As this Court said in Adams Manufacturing Co. v. Storen (1938), 304 U. S. 307, at page 310, the Indiana Gross Income Tax Law is *not* imposed for the privilege of transacting business, since in many instances it applies to the receipt of income by persons who conduct no business. In Department of Treasury v. Ingram-Richardson Manufacturing Co. (1941), 313 U. S. 252, this Court upheld Indiana's right to impose its gross income tax upon the local activity of enameling, notwithstanding that the taxpayer was to transport the metal parts to and from Indiana stating:

> "The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellant's magazine in States other than the taxing State in the Western Livestock case, supra, p. 254."

The Ingram-Richardson case is also authority for the proposition that the execution of the contracts outside of Indiana is immaterial, if the income-producing activity is local.

The appellant also cites Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469, 47 S. Ct. 170, which case holds that logs, having commenced their drive down the river for a destination in another state, are not subject to a personal property tax. There are several such cases, particularly those dealing with the movement of logs, in which the question for determination is the point of time at which the goods commenced their interstate journey. That question is important to decide for the protection of *goods* in interstate commerce from the levy of taxes and for the protection of those substantially connected with the interstate movement. In appellant's case, the tax is *not* upon the goods upon the carrier, nor upon the Government, which in fact is the interstate shipper, nor upon the carrier. We do not believe that the element of loading should obscure the basic local activity of appellant which is manufacturing and selling goods, both of which are completed *in Indiana*. Clearly the appellant is not engaged basically in the business of loading and unloading from a carrier as in the stevedoring cases.

Under the particular facts in appellant's case, the element of loading on the carrier is the only fact approaching that of a connecting link to the interstate carriage, which in reality is interstate commerce of the Government and of the

carrier. There was no activity, no obligation, in fact nothing required of the appellant to be done outside of Indiana. This being so, we refer the Court to Canton Railway Co. v. Rogan (1951), 340 U. S. 511, and Interstate Pipe Line Co. v. Stone (1949), 337 U. S. 662, which upheld the right of a state to impose a non-discriminatory gross receipts tax even on an interstate enterprise "not reaching any activities carried on beyond the borders of the state," or if the tax be fairly apportioned to business done within the taxing state. Thus, even though this Court should consider appellant to be engaged in interstate commerce, the above cases would seem to uphold Indiana's right to tax, since there is here no activity carried on by appellant outside of Indiana.

III.

Multiple taxation is not possible.

Appellant claims that its case is governed by the opinion of this Court in Adams Manufacturing Co. v. Storen (1938), 304 U. S. 307, 58 S. Ct. 913. We submit that under the facts in appellant's case the imposition of the tax complies with the test set out in the Adams decision. In that case, 304 U. S. 307 at page 311, this Court stated:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commere clause forbids. * * *"

In appellant's case, the state in which the goods are *sold* as well as that in which they are manufactured is one state, —Indiana. We do not see in what manner these goods could be subjected to the risk of a double tax burden. For one thing, the seller could not be taxed elsewhere by reason of this Court's opinion in McLeod v. Dilworth (1944), 322 U. S. 327, for the reason that appellant is through selling or has completed its selling in Indiana. Further, before leaving Indiana, title vested in the Government so that no state could tax such goods. See James v. Dravo Contracting Co. (1937), 302 U. S. 134.

IV.

Appellant's receipts as sub-contractor were in substance derived from activities substantially indistinguishable from its activities under its prime contracts. It is to be noted that not until this litigation progressed past its initial stages did the appellant attempt to make any distinction between its activities as prime contractor with the Government and those as sub-contractor under a contract with an out-of-state corporation which was the prime contractor with the Government. Its claim for refund as filed with the appellee and attached to its complaint as Exhibit A states merely the following:

> "It is the contention of the Corporation that, since it was contemplated by the parties to the contracts under which such shipments were made at the time such contracts were executed that materials called for thereby would be shipped to points outside the State of Indiana, such sales were interstate transactions and, therefore, not subject to the Gross Income Tax or World War II Bonus Tax. The taxpayer further contends that the use of government bills of lading to effect such shipments did not alter the interstate character of the transaction."

From the foregoing, it is to be noted that at *that* time the appellant was relying solely upon the idea that *mere knowledge* on the part of the seller that goods would be shipped outside of Indiana would be sufficient to engender interstate commerce immunity for the seller. Also, in its complaint, no differentiation was stated concerning the activities as prime and sub-contractor other than in paragraphs 4 and 7, which merely stated that some of its receipts were from sales of items to manufacturers, that all items were intended by the parties to be shipped to destinations outside of Indiana and designating the amount of tax involved in the prime contract activity and that involved in the sub-contract activity. Even as late as June 21, 1957, on which date the appellant filed its Petition for Rehearing with the Indiana Supreme Court, on the matter of the sub-contracts appellant merely stated:

> "10. The Court erred in ruling that the transactions involving Appellant in its capacity as a subcontractor were the same and identical to the transactions in which Appellant was a prime contractor."

Also in the Jurisdictional Statement filed with this Court, the question of the sub-contracts does not appear to be explicitly, at least not emphatically pressed except that Question No. 3 of the Questions Presented, as appears on page 5 of the Jurisdictional Statement, relates to the question of sub-contracts. On page 13 of appellant's Jurisdictional Statement is the following:

> "Question 3 is intended to preserve one additional partial defense relied upon by the State in relation to the meaning of the 'acceptance' provisions of the sub-contracts involved in this case. The argument here is very similar to that under 'inspection and acceptance' point with respect to the prime contracts."

We do not know whether to consider this statement as an admission that the two activities and the arguments respecting the same are similar or whether the statement refers to the State's argument as being similar. If the latter is intended, then the Jurisdictional Statement does not appear to present the question of sub-contracts other than to state the question.

As a matter of fact and as heretofore stated in appellee's Statement, the only distinction between the prime contracts and the sub-contracts was that in the latter the goods were by contract subject to inspection and acceptance by the out-of-state corporation which held the prime contract with the Government. However, the fact situation with respect to the sub-contracts is peculiar in the following respects. The Government knew that the work given its out-of-state prime contractor had been sub-let to the appellant and the out-of-state prime contractor also knew that the Government had knowledge that the work was being done by appellant.

The same degree of surveillance and inspection by the Government at the Indiana plant of the appellant prevailed as in the case of appellant's prime contracts. The Government made the same acceptance in Indiana and the goods were delivered, not to the out-of-state prime contractor, but to the Government in Indiana in the same manner as in appellant's prime contracts. The Government took title to the same and they were shipped on the Government Bill of Lading to the out-of-state contractor.

In short, the customer (Government) of the out-of-state prime contractor had already inspected, accepted and acquired possession and title to the goods in Indiana. These were goods for the armed forces and the importance to the Government of detecting imperfections in the goods

at the initial point of manufacture was apparent. Basically it was the *Government* whose satisfaction and acceptance were necessary.

It is not clear what circumstances would cause the out-of-state prime contractor to reject the goods when its customer (the Government) had already inspected and accepted them. It is also not clear in what manner the out-of-state contractor could reject the goods, since they were owned by the Government. Further, the record discloses no instance in which any out-of-state prime contractor ever rejected any goods or complained of them. Apparently the inspection and acceptance by the Government sufficed both for it and its out-of-state prime contractor. There is, therefore, considerable basis of similarity between appellant's prime and sub-contract activity since in each the ultimate end was to manufacture goods satisfactory to the Government.

CONCLUSION

We believe that the facts herein show that appellant's activities were essentially those of manufacturing and selling *in Indiana*. The pattern of activities clearly indicates that the Government exerted its supervision and inspection of the articles manufactured for our armed forces continuously from the initial stages; that the Government chose to complete the transaction by acceptance and delivery of the goods to it at the earliest possible moment after manufacture, purposely, for the security and defense of our country, to avoid the mishaps, delay and additional expense that might normally occur if it had received the goods in the ordinary course of interstate commerce. The effect of everything which the Government did was to

localize the transaction in Indiana. Furthe the appellant had no duty to perform or other responsibility or liability outside of Indiana.

We believe that appellant's questions have already been decided by prior, unaltered, substantially identical and indistinguishable decisions of this Court and on that basis respectfully move the Court to dismiss appellant's appeal on the basis that it does not present a substantial federal question.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana,

LLOYD C. HUTCHINSON,
Deputy Attorney General,
Attorneys for Appellee,

219 State House,
Indianapolis, Indiana,
MElrose 5-4456.